POINT III

A RETRIAL OF THE APPELLANT WOULD VIOLATE THE APPELLANT'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The original trial of the case at bar was set according to the certified official docket (part of this record on appeal) on February 26, 1979 for April 9, 1979. Thereafter, the record reveals that the case was reset for May 14, 1979. A jury was actually selected that day and they were given instructions to return June 11, 1979. The record of official proceedings for June 11, 1979 reveals the following notation:

"6/11/79

(ODC/pcc) RE CALLING CASE FOR TRIAL AS TO DEFT. SARMIENTO-PEREZ.
Case called for trial. Out of presence of jury, government stated that co-counsel Michael Striar represented co-deft. Ybanez who has pled guilty and is now co-counsel for deft. Perez and a poss. conflict now exists. Court stated that if Ybanez testifies, the poss. conflict will be taken up at that time. Government's motion for a one day continuance pending application for immunity for testimony of co-deft. Aguilar, denied. Defendant's oral motion for change of venue to Florida denied along with motion to quash jury jury panel. Defendant's motion to quash or in the alternative for supplemental voir dire granted only as to the request for

supplemental voir dire. Out of presence of jury, Robert Aguilar called to the stand for the purpose of ascertaining if he will invoke the 5th amendment. Court recessed until Aguilar has had an opportunity to confer with his atty. After reconsideration, Court granted defendant's motion to quash and set jury selection for 10:00 a.m., July 17, 1979. Jury discharged prior to being sworn."

Thus on June 11, 1979 the Government was fully aware that the testimony of Roberto Antonio Aguilar could not be obtained until and unless the Government could obtain immunity for said individual. The jury was discharged as stated above.

The jury was selected on July 18, 1979 and trial commenced on July 23, 1979. The certified official docket sheet describes the proceedings of that day:

"7/23/79

(ODC/pcc) RE FIRST DAYS TRIAL.
Out of presence of jury, government stated that at the time of arrest of deft. Robert Aguilar, a written statement was given implicating deft. Perez. Aguilar advised the government that he will not now testify. Govt. requested that Aguilar be placed on the stand and ordered to testify by the Court to determine the unavailability of the witness. Court will take up this matter after the noon recess. Court stated it was satisfied that no conflict exists by Mr. Striar coming into this case as co-counsel for deft. Perez. Defendant's motion to quash

jury denied. and Court will prepare and file a memorandum. Jury sworn. Defendant invoked the Rule. Witnesses sworn. Ismael Fuentes excused from the Rule for the govt. Government's wit: (1) Out of presence of jury, a James Hearing was held. Court stated there is substantial independent evidence of a conspiracy and the testimony of co-defendants will be permitted to go to the jury. Government's wit: (2) Out of presence of jury, Roberto Aguilar called to the stand to determine whether or not he would testify. Aguilar stated that on the advice of his counsel he was refusing to testify even after being Ordered by the Court to do so. Court declared the witness unavailable and stated his written statement would be admitted into evidence. Government's wit: 3 & 4 Trial not concluded. Court recessed until 9:00 a.m., July 26, 1979."

Almost one and one-half months after the Government was advised by Aguilar that he was invoking the Fifth Amendment to the United States Constitution in order not to testify the Government still had not obtained a grant of immunity for Aguilar and thus was unable to produce his testimony at trial.

In addition to this glaring deficiency in the Government's case, which formed the basis of the opinion of this court (see *United States v. Sarmiento-Perez, supra*) this court noted that the government was not prepared properly in regard to the evidence involving the contraband. (R. 24)

Thus, it is pointed out now that the Government had ample time to prepare the prosecution and more than a sufficient opportunity to adequately present its case against Sarmiento-Perez to the jury. The Government cannot argue that it was improperly denied the opportunity to present the entire case against the defendant.

In discussing the effect of the Government having the opportunity to present a prima facie case the Court stated in *United States v. Wiley*, 517 F.2d 1212, 1200 n 39 C.A.D.C. (1975):

> "We are cognizant that in most circuits the decision to permit a new trial generally turns on whether the Government could supplement its inadequate case if allowed to retry the defendant. See, e.g., *United States v. Koonce*, 485 F.2d 374, 382 (8th Cir. 1973). Where the Government has put in all of its evidence or the Court of Appeals concludes that there is no realistic possibility of remedying the deficiency, the case is remanded with instructions to dismiss the indictment. See, e.g., *United States v. Snider*, 502 F.2d 645, 656 (4th Cir. 1974); *United States v. Edmons*, 432 F.2d 577 (2d Cir. 1970); *Murray v. United States*, 403 F.2d 694 (9th Cir. 1968). In some cases a mere possibility of obtaining sufficient evidence has been found adequate to make a retrial just and appropriate. See, e.g., *United States v. Koonce*, 485 F.2d 374 (8th Cir. 1973); *United States v. Morado*, 454 F.2d 167 (5th Cir.), *cert. denied* 406 U.S. 917 (1972), 92 S.Ct. 1767, 32

L.Ed.2d 116; *Beltran v. United States*, 302 F.2d 48, 52 (1st Cir. 1962).

"We have carefully considered the approach employed in these and numerous similar cases and conclude that in general it is not in the interest of justice to accord the prosecution more than one fair opportunity to present a *prima facie* case against a criminal defendant. To do so would enable the prosecution to utilize evidence presented by the defense to build a *prima facie* case at retrial and to correct tactical mistakes in order to enhance the prospects of obtaining and sustaining a conviction. Moreover, confining the Government to a single prosecution furthers sound judicial administration by creating incentives for thorough preparation and careful presentation of the Government's case. These considerations coupled with the policy against multiple prosecutions, the policy underlying Rule 29, and the interest in avoiding disparate treatment of similarly situated defendants (see note 35 *supra*) outweigh the Government's interest in obtaining convictions.

"Our approach is comparable to that taken in some prior circuit court opinions. *See, e.g., United States v. Bass*, 490 F.2d 846, 852-53 (5th Cir. 1974) (ruled district judge may refuse to permit a retrial 'if he finds from the record that the prosecution had the opportunity to develop its case . . . at the first trial.'); *United States v. Smith*, 437 F.2d 538, 542 (6th Cir. 1970) (retrial 'hinges, in our view, on whether the Government was unfairly prevented from

producing competent evidence'); *United States v. Howard*, 432 F.2d 1188, 1191 (9th Cir. 1970) (concurring opinion of Ely, J. in which Hufstedler, J., joined) (where the prosecution 'had the opportunity fully to develop its case, or, in fact, did so' and '(i)f it did, or if it appears that it was responsible for its failure adequately so to do, then it is not ordinarily fair that the successful appellant should be required to undergo another trial')."

The prosecution should not be afforded a second opportunity to supply evidence which it failed to muster in the first proceeding. *Burks v. United States*, *supra*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 24 day of September, 1982 to: Solicitor General of the United States, Department of Justice Building, Washington, D.C. 20530.

ARTHUR ADDESS, Esquire
Counsel for Petitioner
2212 Biscayne Blvd.
First Floor
Miami, Florida 33137
Phone: 305-576-8322

ARTHUR ADDESS